

South Carolina Water Withdrawal Act

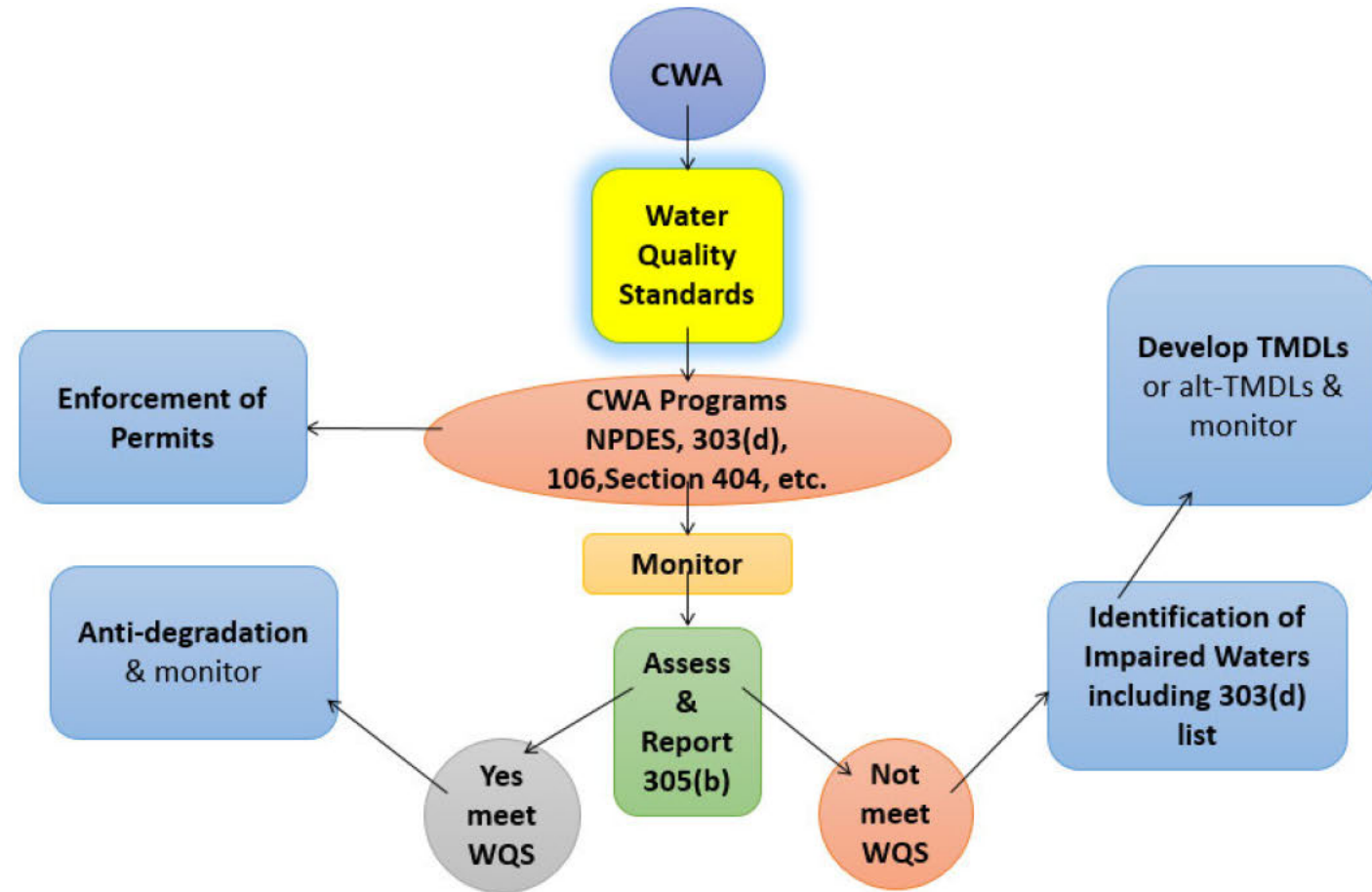
EPA Region 4 Regional Administrator Briefing
January 19, 2022

Purpose and Overview of Today's Briefing

- **Purpose:** Provide an overview of a pending EPA disapproval under Clean Water Act (CWA) section 303(c) on certain provisions in the South Carolina Water Withdrawal Act (SCWWA) and SC Regulation 61-119 (R. 61-119).
- **The disapproval would need to be signed by the Regional Administrator.**
- **Overview:**
 - November 2016 Petition and October 2021 Notice of Intent from American Rivers et al. seeking EPA review of SCWWA and R. 61-119 under CWA section 303(c).
 - Staff analysis found that certain provisions of the SCWWA and R. 61-119 warrant 303(c) review, are not consistent with CWA requirements and should be disapproved.
 - Senior OW managers have been briefed and have met with the NGOs.

Background: Water Quality Standards

- State WQS set the foundation for meeting the CWA objective to restore/maintain the chemical, physical & biological integrity of the nation's water.
- All other CWA programs implement the State WQS.
- WQS include:
 - Designated Uses of Waterbodies
 - Criteria to protect that use, and
 - An antidegradation policy
- States develop WQS and submit them to EPA



Background: EPA review of WQS under the CWA

- EPA reviews new or revised state WQS under section 303(c) of CWA.
 - Approves or disapproves
 - If disapproving, must “specify the changes” necessary to meet CWA requirements
 - If state does not adopt changes within 90 days, EPA must “promptly” propose WQS that meet CWA requirements and then promulgate within 90 days of proposal
- Consistent with case law, (b)(5)
[REDACTED]
- Although rare, to date EPA has reviewed several provisions under section 303(c) of CWA that were not submitted to EPA for review.

Background: SCWWA and R. 61-119

- SCWWA went into effect Jan 1, 2011; R. 61-119 in June 2012.
- SCWWA and R. 61-119 specify registration and permitting requirements for water withdrawals from surface waterbodies.
 - It sets limits for the minimum amount of water left in stream/river.
 - Allows withdrawals of large amounts of water, sometimes exceeding the amount of water in SC rivers and streams
 - NGOs and citizens have expressed concerns about impacts of these withdrawals on aquatic life and believe it is, in effect, a change to WQS.

(b)(5)

Background: EPA position on hydrologic conditions as WQS

- WQS are intended to address the physical, chemical, and biological integrity of our nation's waters, including hydrologic conditions.
- EPA has published on and encouraged states to develop hydrologic criteria to protect rivers and streams, and approved protective narrative and numeric hydrologic WQS adopted by multiple states and tribes.
- To date, EPA has not disapproved, required a state to adopt, or promulgated an explicit hydrologic criterion for any state or tribe.

Background: Stakeholder engagement on SC hydrologic conditions and SCWWA/R. 61-119

- On November 17, 2016, American Rivers, Friends of the Edisto, and Save Our Saluda petitioned EPA to review SCWWA and R. 61-119 for consistency with the CWA.
- In 2017, the WDD at that time directed R4 staff to contact SC and continue working with them and stakeholders (incl. Petitioners) to address issues without providing written response.
- SC agreed to develop explicit hydrologic criteria in 2022; however, such criteria would not be adopted by the State until summer 2023 at the earliest.
- October 18, 2021, NOI from Southern Environmental Law Center, on behalf of American Rivers and Upstate Forever, made the following Claims for Relief:
 - EPA violated CWA section 303(c) by failing to review SCWWA and R. 61-119
 - EPA violated APA for failing to respond to 2016 Petition within reasonable time

Contents of the Notice of Intent to Sue

Asserts that SCWWA and implementing regulations “effect a change” in state WQS:

- By setting minimum flows and levels and ‘safe yields,’ and,
- Exempting other withdrawers from meeting any of those minimum conditions.

Requests:

- That EPA initiate review of the SCWWA and implementing regulations within 60 days
- That EPA respond to the 2016 petition within 60 days (Dec. 18, 2021)
- SELC has now allowed for an additional 30 days (Jan. 17, 2022)
- SELC is aware that EPA plans to issue a decision in February

Background: How EPA determines whether provisions are WQS requiring CWA section 303(c) review

- In 2012, EPA published a FAQ document outlining 4 questions it considers when evaluating whether a provision is a WQS (“4-part test”):
 1. Legally binding provision adopted or established pursuant to state or tribal law?
 2. Addresses designated uses, water quality criteria (narrative or numeric) to protect designated uses, and/or antidegradation requirements for waters of the US?
 3. Expresses or establishes desired condition (e.g., uses, criteria) or instream level of protection (e.g., antidegradation requirements) for waters of the US immediately or mandates how it will be expressed or established for such waters in the future?
 4. Establishes a new WQS or revises an existing WQS?

Conclusions on appropriate EPA action

- (b)(5) [REDACTED]
- (b)(5) [REDACTED]
- For minimum instream flow provision:
 - (b)(5) [REDACTED]
 - [REDACTED]
- [REDACTED] the changes”
necessary to meet CWA requirements (i.e., a remedy).

Remedy: SC must adopt hydrologic standards

- Assert that the State must not use these four SCWWA and R. 61-119 provisions for CWA purposes.
- Specify that the State must adopt new protective hydrologic standards:
 - Example: (b)(5)

Current Status

Based on a full review, the recommendation is that the final Agency action would disapprove (b)(5) provisions as WQS:

- Assert that the SCWWA and implementing regulations cannot be used for any purpose under the CWA.
- Have the state adopt protective hydrologic WQS as the remedy.

(b)(5)

Timeline for State's Adoption of New WQS

- Jan 5, 2022: EPA met with SCDHEC to kick off triennial review. State confirmed it will proceed with flow WQS.
- Late Feb 2022: State anticipates a Notice of Drafting
- April/May 2022: Stakeholder meetings
- Nov 2022: Public Hearing on Final Draft WQS
- Jan 2023: Final rule to State Legislature
- May 2023: Final publication
- Aug 2023: Submit to EPA
- Oct 2023: EPA review

Next Steps

- Continue drafting the Decision Document
- Reviews by HQ OW, OGC.
- Ready for RA signature in February or early March.

Expected Stakeholder Responses

State agency (SC DHEC)	<ul style="list-style-type: none">• (b)(5)
Environmental litigants	<ul style="list-style-type: none">• (b)(5)• (b)(5)
Water withdrawers	<ul style="list-style-type: none">• (b)(5)• (b)(5)• (b)(5)
State legislature	<ul style="list-style-type: none">• (b)(5)• (b)(5)